

(2)
No. 87-1861



In The
Supreme Court of the United States
October Term, 1987

JEAN GREEN, in her capacity as City Clerk,
and EUGENE FORD, in his capacity as Director
of the Highland Park Election Commission,

Petitioners,

v.

GODFREY FRANKLIN and TALIB KARIM,

Respondents.

On a Petition for a Writ of Certiorari
to the Supreme Court for the State of Michigan

**RESPONDENTS' BRIEF IN OPPOSITION
TO CERTIORARI**

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Defendants violate Plaintiffs' constitutionally protected right of suffrage?

2. Was relief granted by the trial court in accordance with applicable law?

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Respondents, GODFREY FRANKLIN, an unsuccessful candidate for election to the office of Mayor of the City of Highland Park, Michigan, in the November, 1983 general election, and his campaign manager, TALIB KARIM, respectfully request that this Court deny the

petition for certiorari to review the decision of the Michigan Supreme Court in *Franklin and Karim v. Highland Park City Clerk, et al.*, 429 Mich. 855 (1987), affirming *Franklin and Karim v. Highland Park City Clerk, et al.*, unpublished Michigan Court of Appeals Opinion, Docket No. 82887.

STATEMENT OF THE CASE

Petitioners have not presented a correct statement of the case.

Additional details must be provided.

In the general election of November 8, 1983, 5,436 ballots were cast for the office of Mayor. Of that total, 1,027 or 18.9% were absent voter (AV) ballots. (PL EX 29) AV ballots were cast city-wide, as opposed to having been cast in each precinct. However, the absent voter ballots were treated as one precinct, Precinct 26. There were 25 geographically located precinct polling places. Of those 25 precincts, Respondent Franklin carried 15, and but for the absent voter balloting, he would have won the election.

When the ballots were counted, and when the final canvass was ultimately certified by the Board of City Canvassers on November 9, 1983, incumbent Mayor Blackwell had garnered 2,800 votes, and Respondent Franklin had obtained 2,643 votes. Respondent Franklin lost the election by 157 votes. A closer examination of the votes reflects that Respondent Franklin obtained 2,300 votes from those voters who did not cast absent voter ballots. Mayor

Blackwell obtained 2,156 of such votes, 144 votes less than Respondent Franklin. In the absent voter precinct, Blackwell obtained 644 votes, and Franklin obtained 343 votes. The difference was 301 votes. Reviewing the tally as a whole, Blackwell won by 157 votes out of a total of 5,436 ballots cast, a margin of 2.8% of the total ballots. In the total of all precincts exclusive of the absent voter precinct, Respondent Franklin "won" by 144 votes out of the total of 4,456, or 3.2% of the total votes cast. But in the absent voter precinct, where Mayor Blackwell defeated Respondent Franklin by 301 votes, his margin of victory represented 30% of the total of absent voter ballots.

The case, then, was about the conduct of the election in the absent voter precinct, and it arose from numerous violations of the state election laws by the City Clerk, Petitioner Jean Green, and the Mayor, Robert Blackwell.

From among the groups of potential absent voters, that group which is ripe for exploitation is those 60 years of age or older, the senior citizens. In Highland Park, there are a substantial number of senior citizens. They live in residences established solely for their occupation. Those residences are known as Downes Manor, LaBelle Towers, Bishop Moore, Gabriel, and 279 Ridgeton. The number of potential voters living in those residences alone was estimated by witness Christine Franklin, former wife of Respondent Godfrey Franklin, to be 100 to 200 in each of the buildings. (TR VII, p. 44; TR VII, pp. 31-32) Given the fact that there are five buildings, the potential is for 1,000 absent voter ballots from senior citizens, about 18% of the total vote cast for Mayer, and clearly enough to affect the outcome of the election.

The importance of the senior citizen vote was agreed to by all parties. Mayor Blackwell had a committee concerned only with soliciting absent voter ballots (TR IX, p. 30), and he actively campaigned for AV ballots from senior citizens, as well as others. (TR IX, p. 31)

Petitioner Jean Green, in fact, had a network of authorized representatives established for the senior citizen residences to solicit absent voter ballot applications, to run the ballots to the residences, to vote the ballots within the residences, and to run the voted ballots back to the clerk's office. (TR VIII, pp. 64-66, 69-71)

The Petitioners suggest that the decision of the Michigan Court of Appeals, and the Respondents' case, turned on an isolated instance of the failure of a subordinate of Jean Green to act in accordance with law. Nothing could be further from the truth. Rather, Jean Green engaged in manipulation of the balloting by absent voters in complete disregard of the requirements of the Michigan election law, and her efforts had an adverse consequence for rights guaranteed to Respondents Godfrey Franklin and Talib Karim by the United States Constitution.

The applicable provisions of Michigan law are found in the Michigan Election Law of 1954, Act 116 of the Public Acts of 1954, the same being MCL 168.1-168.992.

Jean Green's misconduct and her violations of the election law were numerous.

Jean Green accepted, and Jean Green countenanced the acceptance of, applications for absent voter ballots more than seventy-five (75) days before the general election, in violation of Section 759 of the election law.

Jean Green failed to make, and failed to cause to be made, lists of persons who applied for absent voter ballots, including their addresses, the date of receiving the application, the date of mailing the ballot to the voter, and the date of receiving the ballot from the voter; and following the belated preparation of the lists, she refused to make the applications and lists available for inspection by Respondents Franklin and Karim, in violation of Section 760 of the election law.

Jean Green refused to permit Respondent Talib Karim, a properly-qualified person, to make application as a Registrar, in violation of Section 504 of the election law.

Jean Green omitted to include with the absent voter ballots a set of instructions and a statutory warning, which warning addressed much of the misconduct of which Jean Green and her subordinates were guilty, in violation of Section 764(A) of the election law.

Jean Green failed to require persons who assisted absent voters in marking their ballots to sign the ballots, stating that they had, in fact, assisted absent voters, in violation of Section 761 of the election law.

Jean Green oversaw the delivery to senior citizen residences in the City of Highland Park, and she received from senior citizen residences in the City of Highland Park, large numbers of absent voter ballots, in violation of Section 761 of the election law, which required ballots to be mailed or delivered in the order in which the applications for requests were received.

Jean Green told one of her assistants to conduct gatherings at which the senior citizens voted absent voter ballots, in violation of Section 764(A) of the election law.

Jean Green and her subordinates accepted unsealed ballot envelopes containing ballots for counting, in violation of Section 764(A) of the election code, which requires ballot envelopes to be sealed upon delivery.

Jean Green permitted persons other than the absent voter to deliver absent voter ballots, en masse, to the Clerk's office, without written authorization, in violation of Section 764(A) of the election law.

Jean Green willfully disobeyed the lawful instructions of the Secretary of State of the State of Michigan, regarding the conduct of elections, in violation of Section 93(M) of the election code.

All of the foregoing violations of the election law were admitted.

Mention is made in the Petitioners' statement that the Respondents sought leave of the trial court to file a third amended complaint, setting forth First Amendment rights which had been violated by the conduct of the Petitioners, the facts supporting which were the subject of testimony at the trial. The trial court did, in fact, deny leave to file a third amended complaint, but the Michigan Court of Appeals ruled "that it was error for the trial court to refuse Plaintiffs' motion to amend; however, given that the jury was instructed regarding Plaintiffs' First Amendment rights, this error is harmless."

Both Respondents Franklin and Karim voted in the election.

Petitioners did not include in their appendix the original decision of the Michigan Supreme Court, which is attached as Appendix 1.

REASONS WHY THE WRIT SHOULD BE DENIED

- I. **The Petitioners Have Failed To Present Reasons For Granting Certiorari Under Rule 17.1, And They Have Created And Addressed The Issue Of The Liability Of A Public Official For A Subordinate's Activity Although That Issue Was Not An Issue In The Case.**

Petitioners have failed to state, by reference to Supreme Court Rule 17, why the writ of certiorari should be granted. There is clearly no federal court of appeals' decision in conflict with the decision of another federal court of appeals, and there is no assertion in the petition that the Michigan Supreme Court has decided a federal question in a way that is in conflict with a decision of another state court or with the federal court of appeals.

It is perhaps under Rule 17.1(C) that the petition is brought, on the assertion that there is an important question of federal law which has not been but should be settled by the Supreme Court of the United States.

In fact, Petitioners have isolated a fragment of the unpublished Opinion of the Michigan Court of Appeals, in an attempt to fabricate an issue which was not properly raised by the Petitioners during proceedings below.

That issue is the purported misconduct of a subordinate for which Jean Green is alleged to have been held liable.

That issue was not raised as an affirmative defense, nor was it raised at trial, nor was it raised on appeal to the Michigan Court of Appeals or in Petitioners' motion for rehearing to the Michigan Court of Appeals. It was first raised in Petitioners' Application for Delayed Appeal to the Michigan Supreme Court.

The focus of the trial was the active misconduct of Jean Green and Robert Blackwell, not supervisory liability.

The trial addressed the manipulation of absent voter balloting by both of them as incumbent officeholders and candidates, and the effect of that manipulation on the constitutional rights of the Respondents. Jean Green, and through her, Robert Blackwell, had at her fingertips the machinery to solicit applications for absent voter ballots; to run the ballots by messenger to senior citizens' residences; to distribute the ballots at the senior citizens' residences and to conduct meetings therein to vote absent voter ballots; and to return the voted ballots for counting. If these activities can be concluded before other candidates have an opportunity to identify and reach prospective absent ballot voters, an incumbent may successfully exclude other candidates from access to such voters, or at least delay access by other candidates, and thereby have a significant impact on the outcome of the election. Incumbents are thereby favored over non-incumbents, because the incumbents, the Mayor and City Clerk, control the machinery of the election process. Unfortunately, a strong case could not be made against Robert Blackwell, and the verdict caught only Jean Green.

The Petitioners also claim that Respondents failed to prove an infringement of constitutionally protected rights. Jean Green's manipulation of the absent voter balloting, particularly in the senior citizens' residences, resulted in a debasement and dilution of the votes of Godfrey Franklin and Talib Karim. If a block of votes, sufficient in number to affect the outcome of the election, is subject to manipulation by an incumbent candidate who controls the election machinery, then the votes of opposing candidates and their supporters become worthless.

The advantage to those having such an opportunity is clear. The number of votes separating Franklin and Blackwell among the ballots cast in the precincts was small. The number of votes separating them among absent ballot voters was large, reflecting the advantage to those who were in a position to manipulate the absent voter balloting.

Although the facts of this case were not addressed in *Reynolds v. Sims*, 377 U.S. 533, 83 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Supreme Court clearly identified the right of suffrage as a protected right, and went on to state the following with respect to a diminution of that right:

The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. 377 U.S. at p. 555.

The decision of the Michigan Court of Appeals, which is the decision clearly under attack by the Petitioners, is entirely in harmony with the decision of the Supreme Court of the United States in *Reynolds v. Sims*. Neither decision should be disturbed.

Respondents also asserted that other rights given constitutional protection were adversely affected: the right to freedom of association, to free political belief and expression, and to equal participation in the electoral process. *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979), and the issue of the impairment of those rights was decided by the jury as well.

II. The Proofs Supported The Award Of Damages And The Award Of Injunctvie Relief.

Petitioners object that because the claim for *quo warranto* was disposed of at trial on motion for directed verdict, that the election was validated; that Respondent Godfrey Franklin had no right to the office of Mayor; and he could therefore recover no damages.

This analysis by the Petitioners fails to recognize that two entirely different claims were presented by the Respondents at trial.

First, Respondents challenged Robert Blackwell's title to office as Mayor pursuant to a claim of *quo warranto*. There were two issues. First, were there irregularities in the election in the absent voter precinct. Second, were those irregularities sufficient to affect the outcome of the election. *Behrendt v. Wilcox*, 277 Mich. 232, 241, 269 N.W. 155 (1936). The trial court, using what Respondents claimed was an erroneous method, determined that there were insufficient invalid ballots to affect the outcome. All that the circuit court decided in granting the motion for directed verdict on the *quo warranto* claim was that the Respondents had failed to identify a suffi-

cient number of invalid ballots to affect the outcome of the election.

The second claim was for infringement of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, which rights are protected by Title 42, Sec. 1983, of the United States Code. There were two issues to be decided by the jury; first, did the Defendants act under color of law, and second, did the actions of the Defendants infringe rights guaranteed by the United States Constitution. *Wirth v. Surles*, 562 F.2d 319, 321 (4th Cir. 1977).

The jury decided that the Respondents' constitutionally protected rights had been infringed, and had their rights of suffrage, of access, and of association and exchange of views not been impaired, the outcome of the election would have been different. There was no challenge to individual ballots in the 1983 claim. The award of damages was less than Respondent Franklin sought, he having asked for the Mayor's yearly salary of \$45,500.00 times the four years of office. The jury awarded only \$45,500.00, clearly a compromise verdict.

Although Petitioners complain that the injunctive remedy is inappropriate, they did not set forth in their appendix the text of the injunctive order. The order is appended to this Brief as Appendix 2.

The injunctive order of January 22, 1985, required Petitioner Jean Green to review the procedures of her office and to report to the Court with respect to those steps taken to insure that elections would be conducted in accordance with the law.

Petitioner Eugene Ford was ordered not to sit as an election commissioner until such time as he held the office, as prescribed by the City of Highland Park Charter, which he was required to hold before he could act as an election commissioner.

The courts have broad authority in applying equitable remedies pursuant to Title 42, Section 1983. The objective of the statute is broadly stated as follows:

Section 1983 authorizes federal courts in civil rights cases to grant broad relief in equity, or other proper proceedings and is designed to provide a comprehensive remedy for the deprivation of constitutional rights. See *McNeece v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 (1966).

This Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267; 28 L. Ed. 2d 554 (1971), discussed the equitable powers of the courts as follows:

However, in seeking to define the scope of a remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity . . . 91 S. Ct. at 1283.

The Court quoted from *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944), wherein the Court had earlier considered the nature of equity power:

The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-330.

Petitioners Jean Green and Eugene Ford were guilty of violating the state election law and the city charter. The Court ordered them to comply with the law, and Jean Green was ordered to report to the Court with respect to efforts made by her to correct past improprieties. That remedy was clearly within the scope of the equitable powers of the court.

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CONCLUSION

The Petition for Writ of Certiorari, like the Petitioners' motion for rehearing in the Michigan Court of Appeals, and their Delayed Application for Leave to Appeal in the Michigan Supreme Court, and their Motion for Rehearing in the Michigan Supreme Court, is simply a continuation of the dilatory and vexatious proceedings that have been maintained by them since the decision by the Michigan Court of Appeals.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

SCHIER, DENEWETH & PARFIT, P.C.

By: CARL F. SCHIER (P 19976)
Attorney for Respondents

Dated: May 25, 1988

APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE
STATE OF MICHIGAN, Held at the Supreme Court
Room, in the City of Lansing, on the 28th day of Sep-
tember in the year of our Lord one thousand nine hundred
and eighty-seven.

Present the Honorable

81107 & (68) DOROTHY COMSTOCK RILEY,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,

Associate Justices

GODFREY FRANKLIN and
TALIB KARIM,

Plaintiffs-Appellees, SC: 81107
v COA: 82887
LC: 83-337-651-
HIGHLAND PARK CITY CLERK, AW

Defendant-Appellant,
and

DIRECTOR OF THE HIGHLAND
PARK DEPARTMENT OF PUBLIC
WORKS AND MEMBER OF THE
HIGHLAND PARK, ELECTION
COMMISSION,

Defendant-Appellant,
and

THE CITY OF HIGHLAND PARK,
a municipal corporation; MAYOR
AND MAYOR-ELECT OF THE
CITY OF HIGHLAND PARK;
ACTING CITY ATTORNEY FOR
THE CITY OF HIGHLAND PARK
ELECTION COMMISSION; CHIEF
OF POLICE AND MEMBER OF
THE HIGHLAND PARK ELECTION
COMMISSION, jointly and severally,

Defendants.

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

0922

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

(SEAL) IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the seal of
said Supreme Court at Lansing, this 28th day
of September in the year of our Lord one
thousand nine hundred and eighty-seven.

/s/ Corbin R. Davis, Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

GODFREY FRANKLIN and TALIB KARIM,

Plaintiffs,

vs

Case No: 83 337651 AW

THE CITY OF HIGHLAND PARK, a municipal corporation; ROBERT BLACKWELL, in his capacity as present Mayor and as Mayor-elect of the City of Highland Park; JEAN GREEN, in her capacity as present City Clerk, and as City Clerk-elect of the City of Highland Park; NORRIS GOUDY, in his capacity as Acting City Attorney of the City of Highland Park and Chairman of the Highland Park Election Commission; CARL KERTTU, in his capacity as Chief of Police and as a member of the Highland Park Election Commission; and EUGENE FORD, in his capacity as Director of the Highland Park Department of Public Works and as a member of the Highland Park Election Commission, Jointly and Severally,

Defendants.

ORDER GRANTING INJUNCTIVE RELIEF
IN FAVOR OF THE PLAINTIFFS AND
AGAINST DEFENDANTS JEAN GREEN
AND EUGENE FORD

At a session of the court held in the City County Building, Detroit, Michigan, on January 22, 1985.
PRESENT: THE HONORABLE MICHAEL L. STACEY, CIRCUIT JUDGE.

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Plaintiffs' claims for equitable relief as stated in Count II of their Third Amended Complaint, having been brought on for trial commencing the 10th day of September, 1984, and the trial having been concluded on Thursday, October 18, 1984, and it appearing to the court that there were irregularities in the conduct of the November, 1983, general election in the city of Highland Park, the court having delivered an opinion thereon from the bench, and the court being otherwise fully advised in the premises;

IT IS ORDERED that Defendant Jean Green shall review the procedures of the clerk's office, with respect to the conduct of all elections in the city of Highland Park, Michigan, and,

IT IS FURTHER ORDERED that the Defendant Jean Green shall report, in writing, to this court with respect to those steps taken to insure that elections will be conducted strictly in accord with the laws of the state of Michigan, the lawful rules, regulations and directions of the Secretary of State, and the ordinances and charter of the city of Highland Park.

IT IS FURTHER ORDERED that Defendant Eugene Ford is not properly a member of the City of Highland Park Election Commission, and he is ordered not to act as a member of the Election Commission until such time as he is appointed to that office, prescribed by the charter city of Highland Park, which he must hold in order to sit lawfully as an Election Commissioner of the city of Highland Park.

IT IS FURTHER ORDERED AND ADJUDGED that this court shall retain jurisdiction of this matter for

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the supervision, enforcement and the oversight of this injunctive order.

/s/ Susan D. Borman
For The Honorable Michael L. Stacey,
Circuit Judge

A TRUE COPY
JAMES R. KILLEEN
CLERK

BY SN
DEPUTY CLERK

James W. McGinnis
